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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, COMMISSIONER OF REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, APPELLANTS

v.

CONCETTA SALFI AND DOREEN A. KALNINS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion and order of the United States District Court for the Northern District of California (App. A, *infra*, pp. 1a–8a), are reported at 373 F. Supp. 961.

JURISDICTION

The judgment of the district court, which held unconstitutional 42 U.S.C. 416(c)(5) and (e)(2), was entered on April 16, 1974 (App. B, *infra*, pp. 9a–11a). A timely motion for reconsideration was denied on May 9, 1974 (App. C, *infra*, p. 12a). A notice of appeal to this Court was filed on May 15, 1974 (App. F, *infra*, pp. 19a–20a). On July 6, 1974, Mr. Justice Douglas extended the time for docketing this appeal to and including August 30, 1974. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether the duration-of-marriage requirement in 42 U.S.C. 416(c)(5) and 42 U.S.C. (Supp. II) 416 (e)(2) violates the Due Process Clause of the Fifth Amendment.

2. Whether sovereign immunity bars this unit insofar as it seeks retroactive social security benefits.

3. Whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying members of the class upon the government rather than upon the plaintiffs.

STATUTES INVOLVED

The statutes involved are reproduced in App. E, *infra*, pp. 15a–18a.

STATEMENT

This case involves the constitutionality of provisions of the Social Security Act that define the terms "widow" and "child" for purposes of entitlement to benefits under Title II of the Act. The particular pro-

visions involved provide that a surviving wife of a deceased wage earner who does not meet other specified conditions of eligibility may qualify for benefits if "she was married to [the wage earner] for a period of not less than nine months immediately prior to the day on which he died"[1] and that a surviving child who does not satisfy other eligibility requirements may qualify if it had been a stepchild of the wage earner for not less than nine months prior to the wage earner's death.[2]

The nine-month limitation is inapplicable if the Secretary of Health, Education, and Welfare determines that the wage earner could reasonably have been expected to live nine months at the time of the marriage, and (1) his death was either accidental[3] or in the line

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[1] The surviving wife of a deceased wage earner qualifies for benefits if (1) she is the mother of his child, (2) she legally adopted his minor child during their marriage, (3) he legally adopted her minor child during their marriage, (4) they legally adopted a minor child during their marriage, or (5) she was or would have been entitled to certain benefits upon application in the month prior to their marriage. 42 U.S.C. 416(c); App. E, *infra*, p. 15a.

[2] The surviving child qualifies for benefits if it was the child or legally-adopted child of the deceased wage earner, or in certain circumstances if the child was the grandchild or stepgrandchild of the deceased wage earner or his spouse. 42 U.S.C. (Supp. II) 416(e). See App. E, *infra*, p. 16a.

[3] Accidental death is defined by 42 U.S.C. (Supp. II) 416(k):

"For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries."

of active military duty, or (2) in the case of a remarriage to the wage earner after a divorce the widow or child would have met the nine-month durational requirement at the time of the divorce if the previous marriage had been terminated by death rather than by divorce. 42 U.S.C. (Supp. II) 416(k).

The facts in this case are not in dispute. On May 27, 1972, appellee Concetta Salfi married Londo L. Salfi, a wage earner fully insured under the Social Security Act. On November 21, 1972, less than six months after the date of the marriage, Londo L. Salfi died as a result of natural causes, *i.e.*, a heart attack. On December 8, 1972, appellee Concetta Salfi on behalf of herself and her daughter from a prior marriage, Doreen Kalnins, filed for mother's and child's insurance benefits on the account of Londo L. Salfi. The Secretary denied the applications initially and upon reconsideration because the applicants were not within the definition of "widow" and "child," respectively; they failed to satisfy the nine-month-duration-of-marriage requirement because Londo Salfi had died from natural causes less than nine months after the marriage.

Appellees then commenced this suit as a class action seeking declaratory and injunctive relief and retroactive benefits. A three-judge court convened pursuant to 28 U.S.C. 2282 and 2284, denied the government's motion to dismiss, which motion asserted, *inter alia,* that the court was without jurisdiction, that the suit was barred by sovereign immunity, and that

42 U.S.C. 405(h) specifically precluded review under 28 U.S.C. 1331. On cross-motions for summary judgment, the court held that the nine-month-duration-of-marriage requirement created a conclusive presumption that a marriage lasting fewer than nine months before the wage earner's death was entered into "for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled" (App. A, *infra,* p. 6a). The court held that this presumption violated the Due Process Clause of the Fifth Amendment to the United States Constitution "insofar as [it denied] plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits" (*id.* at 7a).

The court stated that "Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled" and that the duration-of-marriage requirement was a conclusive evidentiary presumption to achieve that purpose (*id.* at 6a). Relying upon this Court's recent decisions in *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632, *Vlandis* v. *Kline,* 412 U.S. 441, and *Stanley* v. *Illinois,* 405 U.S. 645, the Court held the duration-of-marriage requirement to be unconstitutional and enjoined its application.

Although appellees had brought this action as a class action, the district court took no action with respect to the class until it granted appellees' motion for summary judgment. The court then certified the class as consisting of "all otherwise eligible surviving spouses and stepchildren of deceased wage earners

heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2)" (App. A, *infra*, p. 7a). It ordered the Secretary to notify all members of the class and to provide them benefits from the time of original entitlement. These retroactive benefits are estimated by the Social Security Administration to aggregate approximately $35 million.

On July 3, 1974, Mr. Justice Douglas stayed the judgment "to the extent that it orders payment of any benefits and sending any notice to members of the class" pending the Court's disposition of the appeal (App. D, *infra*, pp. 13a–14a).

THE QUESTIONS ARE SUBSTANTIAL

The district court invalidated significant provisions of the Social Security Act and awarded extensive retroactive benefits. The constitutionality of these provisions is a substantial question in the administration of the Act which warrants plenary review by this Court. The appeal also presents the additional substantial questions whether sovereign immunity bars this suit insofar as it seeks payment of retroactive benefits, and whether, in certifying this suit as a class action, the district court improperly placed the burden of notifying the members of the class upon the government rather than upon the plaintiffs.

1. Section 416(c) and (e) of the Social Security Act are valid legislative classifications defining eligibility for widow's and children's benefits under Title

II of the Act. The district court erred in labeling those provisions "conclusive presumptions" without applying principles of equal protection analysis required by this Court's decisions involving social and welfare legislation.

In *Richardson* v. *Belcher,* 404 U.S. 78, 81–82, this Court held that "[a] statutory classification in the area of social welfare is consistent with [equal protection] if it is 'rationally based and free from invidious discrimination.'" See also *Jimenez* v. *Weinberger,* No. 72–6609, decided June 19, 1974, slip op. at 8. Cf. *Kahn* v. *Shevin,* No. 73–78, decided April 24, 1974. Under this standard the statutory definitions of "widow" and "child" contained in Section 416(c) and (e) of the Act are constitutional.

The Social Security Act did not originally provide for survivors' benefits. When such benefits were added in 1939, Congress also determined that it was necessary to protect the Social Security Trust Fund against claims arising from the manipulation of conditions of eligibility. In general, eligibility for benefits under Title II of the Act is based on the existence of a familial relationship and each of the relevant statutory definitions contains a waiting period designed to deter the creation of relationships solely for the purpose of benefit eligibility. See, *e.g.,* 42 U.S.C. 416(b) ("wife"); 42 U.S.C. 416(c) ("widow"); 42 U.S.C. 416(e) ("child"); 42 U.S.C. 416(f) ("husband"); 42 U.S.C. 416(g) ("widower").

There has been a history of continuing revision of

the statutory provisions[4] concerning eligibility which illustrates the phenomenon, often approved by this Court, of Congress dealing with a problem "one step at a time." See *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The creation of an exception to the waiting period for accidental death (Section 416(k)) merely illustrates this principle and is not—as the district court held—a ground for invalidation of the statutory scheme.

The nine-month-duration-of-marriage requirement is a valid objective standard for the furtherance of a legitimate legislative goal. It avoids the expense and administrative burden which would be required by a subjective inquiry on a case by case basis. It reflects a congressional judgment as to a reasonable time within which the spouses' relationships and expectations could justifiably become fixed—at least for purposes of this social insurance program. Although it may result in hardship in some cases, the classification thus created is not "invidious."

This Court's "conclusive presumption" decisions, relied upon by the district court, are inapposite here. The instant classification neither touches on fundamental rights (*Stanley* v. *Illinois*, 405 U.S. 645 (right

[4] The duration-of-marriage requirement has been progressively relaxed in light of congressional experience. Thus, the original rule required a twelve-month waiting period (53 Stat. 1377), which was subsequently been reduced to nine months, 81 Stat. 866. Congress has enacted additional provisions which waive the duration-of-marriage requirements in many instances. See p. 3, n. 1, *supra*.

to custody of one's own children)), nor is it so arbitrary as to constitute a denial of due process of law (*Vlandis* v. *Kline*, 412 U.S. 441 (residency status for university students permanently fixed by their address at time of application); *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (entire household denied food stamps for twelve months where one member was declared a tax dependent in a prior year)). Moreover, unlike the regulation involved in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, the statutory definitions cannot fairly be said to impose a burden on the right of decision in matters of marriage and family life, since persons excluded as beneficiaries under the definitions are not denied benefits which they would have received had they not married.

2. The district court took jurisdiction over this action under 28 U.S.C. 1331, which grants jurisdiction over civil actions involving more than $10,000 which arise "under the Constitution, laws, or treaties of the United States." We submit, however, that this class action, at least insofar as it sought retroactive benefits, is barred by sovereign immunity.

The suit is one against the sovereign because "the judgment sought would expend itself on the public treasury" (*Land* v. *Dollar*, 330 U.S. 731, 738, quoted with approval in *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii* v. *Gordon*, 373 U.S. 57, 58). Thus, unless Congress has waived sovereign immunity, this suit cannot be maintained.

Section 1331 is not a waiver of sovereign immunity, but merely defines the kinds of cases over which the

district courts have jurisdiction. The only provision in the Social Security Act which waives sovereign immunity is 42 U.S.C. 405(g). That section is inapplicable here, however, since it provides for judicial review only "after any final decision of the Secretary made after a hearing." The Secretary's decision in this case was not made after a hearing, but on the basis of uncontested facts which, under the statute, bar the appellees from receiving benefits.

Not only does 28 U.S.C. 1331 not waive sovereign immunity, but the Social Security Act provides that no action may be brought under that section on any social security claim. The Act provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. 405(h). Prior to 1948, the substantive provisions of 28 U.S.C. 1331 were contained in Section 41 of Title 28 (1940 ed.). See 62 Stat. 869, 930, 1005.

Since there is no provision in the Social Security Act or elsewhere by which Congress has consented to a suit such as this, this action appears barred by sovereign immunity.

This Court has recognized, however, that sovereign immunity does not bar suit where the officer is acting pursuant to an unconstitutional statute. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 691, n. 11, 701–702; *Malone* v. *Bowdoin*, 369 U.S. 643, 647. That exception, however, is inapplicable where what is sought from the sovereign is the retroactive

payment of moneys to which the plaintiffs assert they are entitled.

That is the teaching of this Court's recent decision in *Edelman* v. *Jordan*, No. 72–1410, decided March 25, 1974. *Edelman* was a class action against Illinois state officials to recover, *inter alia*, retroactive benefits under Aid to the Aged, Blind and Disabled (AABD)[5] that had been withheld from class members when the State failed to comply with federally-imposed timetables for processing applications. This Court reversed that portion of the court of appeals' decision that permitted recovery of such retroactive benefits against the State. Rejecting the plaintiffs' argument that such payments amounted to "'equitable restitution,'" the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (slip op. at 16), and, therefore were barred by the sovereign immunity principles of the Eleventh Amendment.[6]

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment are equally applicable to suits against the United States. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, also the dissenting opinion of Mr. Justice

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[5] AABD is a federal-state program of categorical assistance funded equally by the State and the Department of Health, Education, and Welfare, and administered by the State. *Edelman*, slip op., pp. 1–2.

[6] This is not a case where retroactive benefits are arguably justified to deter officials from calculated and flagrant violation of the law. Cf. *Edelman*, dissenting opinion of Mr. Justice Marshall, pp. 4–5. Here, the Secretary acted in compliance with an Act of Congress which he believes to be constitutional.

Frankfurter in that case, 337 U.S. at 708. *Edelman* thus establishes that a suit seeking the recovery from the federal government of retroactive welfare benefits is a suit against the sovereign that cannot be maintained unless sovereign immunity has been waived. Since, as discussed above, there has been no waiver here, at least with respect to retroactive benefits, sovereign immunity bars the suit.[7]

3. Finally, as this Court's recent decision in *Eisen* v. *Carlisle & Jacquelin* (No. 73–203, decided May 28, 1974) makes clear, the district court, in certifying this suit as a class action, erred in placing the burden of sending notice to the members of the class upon the government rather than upon the plaintiffs.[8]

Eisen was a class suit brought by an odd-lot trader in securities who himself sought damages of only $70 from certain brokerage firms for alleged violations of the Antitrust and Securities laws committed in the fixing of commissions in odd-lot trading. This Court

[7] The Court indicated in *Edelman* that prospective injunctive relief was appropriate in that case (slip op. at 15–16) (the point was also conceded by petitioners, *id.* at 12) to compel the state officials to comply with federal regulations for the processing of applications of welfare beneficiaries. The Court suggested that prospective relief was appropriate since the monetary consequences were "ancillary" to the substantive relief. See slip op. at 16. For the reasons stated in the text, however, we do not understand *Edelman* to authorize prospective injunctive relief in a case such as this, where the principal relief sought is itself an order to pay money to persons not eligible by statute. See *Larson* v. *Domestic and Foreign Commerce Corp.*, *supra*, 337 U.S. at 691, n. 11.

[8] Since *Eisen* was decided after the district court decided the present case, that court did not have the benefit of this Court's decision.

held that Rule 23(c)(2) of the Federal Rules of Civil Procedure, which is applicable to suits for money damages under Rule 23(b)(3), requires that individual notice be sent "to all class members whose names and addresses may be ascertained through reasonable effort" (slip op. at 15), and that "where * * * the relationship between the parties is truly adversarial, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit" (*id.* at 20). Since Eisen was unwilling to pay for the sending of notices, this Court ordered dismissal of the class action (*ibid.*).

To the extent that this suit seeks retroactive benefits for members of the class, the suit, like the *Eisen* action, is in practical effect one for money damages. See *Edelman, supra,* slip op. at 16.[9] Thus, the class action aspects of the claim for benefits is governed by Federal Rule of Civil Procedure 23(b)(3). Under Rule 23(c)(2), as interpreted by *Eisen,* the district court should have placed the burden of sending notices to all potential class members upon the plaintiffs, to be borne "as part of the ordinary burden of financing

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[9] *Eisen* dealt only with the notice requirements in Rule 23(c)(2), which apply to money damage suits governed by Rule 23(b)(3). Slip op. at 18, n. 14. In our view, however, the notice requirements codified in Rule 23(c)(2) apply also in other kinds of class action suits as a matter of due process. See *Eisen* v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564–565 (C.A. 2) (*Eisen II*). But see also *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (C.A. 5). Cf. *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636–637 (D. Kan.).

his own suit" (*Eisen, supra,* slip op. at 20), and not upon the government.[10]

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

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AUGUST 1974.

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[10] The district court's handling of the class action aspects of this case is inconsistent with *Eisen* in other respects. (1) The court deferred its class action ruling until it had decided the merits. Rule 23(c)(1) requires the court to make the class action determination "[a]s soon as practicable after the commencement of an action." As in *Eisen*, there was no occasion here to defer the class action determination until the merits; that determination did not involve any complex factual issues whose resolution would be aided by considering the merits. The class action determination could and should have been made at the outset of the litigation. Slip op. at 19. (2) The notice to the members of the class should also have been sent when the class action determination should have been made—at the beginning of the litigation, to give them the opportunity actively to participate in the suit or to withdraw from it. Cf. *Eisen, supra,* slip op. at 18.

APPENDIX A

In the United States District Court for the Northern District of California

Case No. C–73 1863 ACW

(Original filed March 22, —Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS

Order Granting Plaintiffs' Motion for Summary Judgment

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* Plaintiffs Concetta Salfi and Doreen Kalnins brought this action on behalf of themselves and all others similarly situated to challenge the constitutionality of two sections of the Social Security Act under which plaintiffs were denied benefits as surviving spouse and child of a deceased wage earner. A three judge district court was properly convened pursuant to 28 U.S.C. §§ 2282 and 2284 to hear the action. Jurisdiction is vested in this court under 28 U.S.C. § 1331 since the action arises under the Constitution and laws of the United States and involves an amount in controversy exceeding $10,000. *White* v. *Bloomberg,* 345 F. Supp. 133, 141 (D. Md. 1972); *Hiss* v. *Hampton,* 338 F. Supp. 1141, 1145–46

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(D. D.C. 1972); *Gainville* v. *Richardson*, 319 F. Supp. 16, 18 (D. Mass. 1970); Wright, Federal Courts § 33 at 116 (2d ed. 1970). The parties have stipulated that there are no material facts in issue, and the case is now before the Court on defendants' motion to dismiss and cross motions for summary judgment.

FACTS

Concetta Salfi married Londo L. Salfi, the wage earner, on May 27, 1972. On June 13, 1972, the wage earner suffered a severe heart attack and was hospitalized until June 29, 1972. Thereafter, on November 21, 1972, less than six months from the date of marriage, the wage earner died from the heart attack. On December 8, 1972, plaintiff Salfi filed her application for mother's insurance benefits and child's insurance benefits, on behalf of herself and plaintiff Doreen Kalnins (her daughter by previous marriage), respectively. These applications were denied both initially and on reconsideration.

The reason for the Social Security Administration's denial of Mrs. Salfi's application for benefits is expressed in the "Reconsideration Determination" attached as Exhibit "D" to plaintiffs' complaint. Under 42 U.S.C. § 402(g), a widow is entitled to mother's insurance benefits provided she qualifies as a widow under the terms of 42 U.S.C. § 416(c). Section 416(c)(5) excludes from the category of "widow" any woman who was married to a deceased wage earner "less than nine months immediately prior to the day on which he died * * *." Under 42 U.S.C. § 402(d), a child is entitled to child's insurance benefits, provided he qualifies as a child under the terms of 42 U.S.C. § 416(e). Section 416(e)(2) excludes from the category of "child" any stepchild who has held that relationship to the wage earner "less than nine months

immediately preceding the day on which [the wage earner] died." The mother and stepchild bringing this action were denied Social Security Benefits as survivors of Londo L. Salfi because they failed to qualify as mother and stepchild pursuant to the exclusions of 42 U.S.C. §§ 416(c)(5) and (e)(2), respectively, as Mr. and Mrs. Salfi were married less than nine months before Mr. Salfi died.

DEFENDANTS' MOTION TO DISMISS

Defendants' motion to dismiss alleges that the jurisdictional requirement of over $10,000 in controversy is not satisfied, that the suit is barred by the doctrine of sovereign immunity, and that plaintiffs have failed to exhaust their administrative remedies.

It has been held in lawsuits of this nature that the amount-in-controversy requirement is satisfied if the benefits each plaintiff may reasonably expect to recover as a result of the lawsuit exceed $10,000. *See* cases cited pp. 1–2 *supra; see Zahn* v. *International Paper Co.*, — U.S. — (No. 72–888 decided December 17, 1973).

In this action plaintiffs are alleging that in applying the sections here under attack, the Secretary of Health, Education and Welfare is committing acts prohibited by the United States Constitution. The rule is clear in this Circuit that even suits which otherwise would be barred by the doctrine of soverign immunity are nevertheless permissible if they allege unconstitutional acts on the part of the defendant. *State of Washington* v. *Udall*, 417 F. 2d 1310, 1318 (9th Cir. 1969); *Turner* v. *Kings River Conservation Dist.*, 360 F. 2d 184, 190 (9th Cir. 1966).

Also without merit is defendants' claim that plaintiffs failed to exhaust their administrative remedies.

Such exhaustion in this case would be futile and therefore is not a prerequisite for bringing the action. The purpose of the exhaustion requirement is to afford the government agency involved an opportunity to review its own decisions with the possibility of correcting its own errors and to afford the parties and the courts the benefit of the agency's experience and expertise in the subject matter in question. *McKart* v. *United States,* 395 U.S. 185 (1969); *Parisi* v. *Davidson,* 405 U.S. 34 (1972). The defendants concede there are no material facts in issue here. There is nothing for the agency to apply its expertise to, nor is there a claim that the agency has erred in interpreting or applying the sections under attack. The only question before this Court is whether those sections violate the United States Constitution, and this question is most appropriate for judicial decision. *McKart* v. *United States, supra; United States* v. *Hayden,* 445 F. 2d 1365, 1375, n. 16 (9th Cir. 1971).

Defendants also contend this action is barred by the provision of 42 U.S.C. § 405(h) that "No action against the United States, the Secretary [of HEW], or any officer or employee thereof shall be brought under [28 U.S.C. § 1331] to recover on any claim arising under this subchapter." We think this provision was intended to do no more than codify the doctrine requiring exhaustion of administrative remedies, and therefore that it is inapplicable to this action for the reasons already stated. *See Gainville* v. *Richardson supra.*

Since defendants have presented no ground which would justify granting its motion to dismiss, that motion will be denied.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants have urged throughout this litigation that Congress may properly specify which classes of

persons are entitled to receive Social Security benefits and which classes are not so entitled. The challenged provisions, according to defendants, are no more than an expression by Congress of which classes of persons are to receive benefits and which are to be excluded.

We reject defendants' strained interpretation of the provisions under consideration here as inconsistent both with the legislative history of the provisions and with other sections of the Social Security Act.

The purpose of the duration-of-relationship requirement found in the provisions here under attack is expressed in House Report No. 92–231, 92d Cong., 2d Sess. (1972), which contains the legislative history for the Social Security Amendments of 1972. In that Report the House Ways and Means Committee explained the purpose of the requirement as follows:

> This duration-of-relationship requirement is included in the law as a general precaution against the payment of benefits where the marriage was undertaken to secure benefit rights.

H.R. Rep. No. 92–231, *supra, reprinted at* 3 U.S. Code, Congressional and Administrative News 5042 (1972). It is apparent that Congress intended these provisions to serve as a device to prevent the use of sham marriages to secure Social Security payments to which the parties to the marriages would not otherwise be entitled.

Furthermore, 42 U.S.C. § 416(k) provides relief from the exclusions of §§ 416(c)(5) and (e)(2) when the death of the wage earner was accidental. The only reasonable explanation for this relief which is apparent to this Court is that a bona fide accidental death establishes a good case that the marriage was not entered into for the purpose of securing Social Security benefits, and the presumption, therefore, is not

necessary then to prevent fraud. This exception to the duration-of-relationship requirement provides additional evidence that the purpose of the requirement is not to define the class of persons who may receive benefits.

Congress clearly intended to prevent the use of marriage as a device for obtaining Social Security benefits to which persons would not otherwise be entitled. As such the requirement constitutes a presumption that marriages like Mrs. Salfi's, which did not precede the wage earner's death by at least nine months, were entered into for the purpose of securing Social Security benefits to which the parties to the marriage would not otherwise be entitled. Because persons who find themselves in the positions of Mrs. Salfi and her daughter are afforded no opportunity to disprove the presumption, the duration-of-relationship requirement functions as a conclusive presumption, and it is the constitutional validity of this conclusive presumption that we shall now consider.

The Supreme Court has recently had occasion to address itself at length to the appropriateness of conclusive evidentiary presumptions. *Cleveland Board of Education* v. *LaFleur,* — U.S. — (No. 72–777 decided January 21, 1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972). In *Cleveland Board of Education* v. *LaFleur, supra,* the Court struck down a requirement that pregnant teachers go on maternity leave several months prior to the expected birth. Writing for the majority, Justice Stewart observed that like in *Vlandis* v. *Kline, supra,* the presumption then under attack was neither "necessarily nor universally true". Slip Op. at 13. The conclusive presumption therefore violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

No purpose would be served by repeating the Supreme Court's thorough discussion of the issue before us. As in *LaFleur* and *Vlandis,* the presumption we are considering is neither necessarily nor universally true. While the duration of the marriage may at times cast suspicion on the intention of the parties when they entered into it, such duration surely is not dispositive of the issue. We offer no suggestion of what hearing provision might satisfy the demands of due process in this instance. We hold today only that 42 U.S.C. §§ 416(c)(5) and (e)(2) are invalid and in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as they deny plaintiffs an opportunity to demonstrate their eligibility for mother's insurance benefits and child's insurance benefits.

ORDER

Accordingly, IT IS ORDERED that jurisdiction is conferred upon this Court by 28 U.S.C. § 1331; and

IT IS FURTHER ORDERED that 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the Due Process Clause of the Fifth Amendment to the United States Constitution; and

IT IS FURTHER ORDERED that this action is certified as a class action pursuant to F.R. Civ. P. Rule 23, and that the class consists of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and children's Social Security survivors' benefits by operation of 42 U.S.C. §§ 416(c)(5) and (e)(2); and

IT IS FURTHER ORDERED that defendants' motion for summary judgment and defendants' motion to dismiss the complaint are denied; and

IT IS FURTHER ORDERED that defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and the class they represent, provided said plaintiffs and class are otherwise fully eligible to receive said benefits; and

IT IS FURTHER ORDERED that defendants shall provide notice of this decision to all present members of the class by mailing such notice to each member of the class within ninety days of the filing of this order; and

IT IS FURTHER ORDERED that said notice be approved by the convening Judge before it is mailed to the members of the class and that the cause be remanded to the convening Judge for such further orders as may be appropriate.

Dated: March 22, 1974.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX B

In the United States District Court for the Northern District of California

Case No. C–73–1863 ACW

(Filed Apr. 16, 1974—Clerk, U.S. District Court, San Francisco)

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DEBACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS

JUDGMENT

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

Pursuant to the Order of March 22, 1974, granting plaintiffs' motion for summary judgment it is hereby adjudged and decreed:

(1) Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331.

(2) Title 42 U.S.C. §§ 416(c)(5) and (e)(2) are declared invalid because they violate the due process clause of the Fifth Amendment to the Constitution of the United States.

(3) This action is certified as a class action pursuant to F. R. Civ. P. Rule 23, the class consisting of all otherwise eligible surviving spouses and stepchildren of deceased wage earners heretofore disqualified from receipt of widow's and/or children's Social Security Survivors' Benefits by operation of 42 U.S.C. §§ 416(c)(5) and/or (e)(2).

(4) Plaintiffs' motion for summary judgment is granted and defendants' motions for summary judgment and to dismiss are denied.

(5) Defendants, their agents, successors and employees are permanently restrained and enjoined from denying benefits to plaintiffs and the class they represent by reason of the nine-month durational marriage requirement embodied in 42 U.S.C. §§ 416(c)(5) and/or (e)(2), and are ordered to provide benefits, from the time of original entitlement, to plaintiffs and each member of the class they represent, provided only that in each case such persons are otherwise fully eligible to receive the benefits.

(6) This Court, acting through the convening judge, shall retain jurisdiction of this case to administer the terms of this order and provide such other and further relief as may be just and proper.

(7) As soon as possible defendants shall prepare and submit to the convening judge for his approval a notice designed to inform the class of this decision. On or before June 22, 1974, such approved notice shall be sent by mail to each member of the class.

(8) Defendants shall reimburse counsel for plaintiffs, the Legal Aid Society of San Mateo County, for the filing fee of $15.00, their cost in the action.

JAMES R. BROWNING,
U.S. Circuit Judge.

WILLIAM G. EAST,
U.S. District Judge.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX C

In the United States District Court for the Northern District of California

Case No. C-73 1863 ACW

(Original Filed, May 9, 1974—Clerk, U.S. District Court, San Francisco)

Order Denying Motions for Stay of Judgment and for Reconsideration of Judgment

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS,

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS.

Before: BROWNING, *Circuit Judge,* and EAST and WOLLENBERG, *District Judges*

WOLLENBERG, *District Judge:* On April 16, 1974, summary judgment for plaintiffs was granted by a Three-Judge District Court. Defendants now move for a stay of that Judgment pending appeal and for reconsideration of the Judgment. All three Judges have reviewed the written arguments submitted by counsel for plaintiffs and defendants, and have agreed that defendants' motions should be denied.

Accordingly, IT IS ORDERED that defendants' motion for a stay of the Court's Judgment of April 16, 1974, is hereby DENIED, and

IT IS FURTHER ORDERED that defendants' motion for reconsideration of that Judgment is hereby DENIED.

Dated: May 9, 1974.

ALBERT C. WOLLENBERG,
U.S. District Judge.

APPENDIX D

Supreme Court of the United States

No. A–1211

CASPAR WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ET AL., APPELLANTS

v.

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED

ORDER

UPON RECONSIDERATION of the application of the Solicitor General, and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Northern District of California in case No. C–73 1863 ACW be, and the same is hereby, stayed only to the extent that it orders payment of any benefits and sending any notice to members of the class pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Northern District of California is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

IT IS FURTHER ORDERED that benefits be paid to the named appellees in accordance with the order of the United States District Court.

W. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this Third day of July, 1974.

A true copy

Test: MICHAEL RODAK, JR.,
Clerk of the Supreme Court of the United States.

APPENDIX E

42 U.S.C. 416(c) provides:

> (c) Widow.
>
> The term "widow" (except when used in section 402(i) of this title) means the surviving wife of an individual, but only if (1) she is the mother of his son or daughter, (2) she legally adopted his son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (3) he legally adopted her son or daughter while she was married to him and while such son or daughter was under the age of eighteen, (4) she was married to him at the time both of them legally adopted a child under the age of eighteen, (5) she was married to him for a period of not less than nine months immediately prior to the day on which he died, or (6) in the month prior to the month of her marriage to him (A) she was entitled to, or on application therefor and attainment of age 62 in such prior month would have been entitled to, benefits under subsection (b), (e), or (h) of section 402 of this title, (B) she had attained age eighteen and was entitled to, or on application therefor would have been entitled to, benefits under subsection (d) of such section (subject, however, to section 402(s) of this title), or (C) she was entitled to, or upon application therefor and attainment of the required age (if any) would have been entitled to, a widow's, child's (after attainment of age 18), or parent's insurance annuity under section 228e of Title 45.

42 U.S.C. 416(e) (Supp. II) provides:

> § 416. Additional definitions.
>
> For the purposes of this subchapter—
>
> * * * * *

(e) Child.

The term "child" means (1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died, and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse, but only if (A) there was no natural or adoptive parent (other than such a parent who was under a disability, as defined in section 423(d) of this title) or such person living at the time (i) such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (ii) if such individual had a period of disability which continued until such individual became entitled to old-age insurance benefits or disability insurance benefits, or died, at the time such period of disability began, or (B) such person was legally adopted after the death of such individual by such individual's surviving spouse in an adoption that was decreed by a court of competent jurisdiction within the United States and such person's natural or adopting parent or stepparent was not living in such individual's household and making regular contributions toward such person's support at the time such individual died. For purposes of clause (1), a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was at the time of such individual's death living in such individual's household and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's sur-

viving spouse before the end of two years after (i) the day on which such individual died or (ii) August 28, 1958; except that this sentence shall not apply if at the time of such individual's death such person was receiving regular contributions toward his support from someone other than such individual or his spouse, or from any public or private welfare organization which furnishes services or assistance for children. For purposes of clause (2), a person who is not the stepchild of an individual shall be deemed the stepchild of such individual if such individual was not the mother or adopting mother or the father or adopting father of such person and such individual and the mother or adopting mother, or the father or adopting father, as the case may be, of such person went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment described in the last sentence of subsection (h)(1)(B) of this section, would have been a valid marriage.

42 U.S.C. 416(k) (Supp. II) provides:

> (k) Waiver of nine-month retirement for widow, stepchild, or widower in case of accidental death or in case of serviceman dying in line of duty, or in case of remarriage to the same individual.
>
> The requirement in clause (5) of subsection (c) of this section or clause (5) of subsection (g) of this section that the surviving spouse of an individual have been married to such individual for a period of not less than nine months immediately prior to the day on which such individual died in order to qualify as such individual's widow or widower, and the requirement in subsection (e) of this section that the stepchild of a deceased individual have been such stepchild for not less than nine months immediately preceding the day on which such individual died in order to qualify as such individual's child, shall be deemed to be satisfied, where such

individual dies within the applicable nine-month period, if—

(1) his death—

(A) is accidental, or

(B) occurs in line of duty while he is a member of a uniformed service serving on active duty (as defined in section 410(*l*)(2) of this title), unless the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months, or

(2)(A) the widow or widower of such individual had been previously married to such individual and subsequently divorced and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce; or

(B) the stepchild of such individual had been the stepchild of such individual during a previous marriage of such stepchild's parent to such individual which ended in divorce and such requirement would have been satisfied at the time of such divorce if such previous marriage had been terminated by the death of such individual at such time instead of by divorce;

except that paragraph (2) of this subsection shall not apply if the Secretary determines that at the time of the marriage involved the individual could not have reasonably been expected to live for nine months. For purposes of paragraph (1)(A) of this subsection, the death of an individual is accidental if he receives bodily injuries solely through violent, external, and accidental means and, as a direct result of the bodily injuries and independently of all other causes, loses his life not later than three months after the day on which he receives such bodily injuries.

APPENDIX F

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL NO. C-73-1863-ACW

CONCETTA SALFI, DOREEN A. KALNINS, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; FERNANDO E. C. DE BACA, IN HIS CAPACITY AS DIRECTOR OF REGION NINE OF UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; JOHN F. RICHARDSON, IN HIS OFFICIAL CAPACITY AS COMMISSIONER FOR REGION NINE OF THE SOCIAL SECURITY ADMINISTRATION; SOCIAL SECURITY ADMINISTRATION, DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that the defendants hereby appeal to the Supreme Court of the United States pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the Judgment of the three-judge District Court entered in this action on April 16, 1974.

On April 25, 1974, the defendants timely moved for a stay of enforcement of judgment and reconsideration of judgment. Said motions were denied by the Court on May 9, 1974.

The defendants appeal from those adverse orders, as well as the Judgment entered April 16, 1974.

Dated: May 15, 1974.

JAMES L. BROWNING, JR.,
United States Attorney.
HOWARD T. CHANG,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1974